

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals, District of Columbia

APRIL TERM, 1908

No. 1898.

561

LEWIS M. HAUPT, APPELLANT,

Luke E. Wright vs.

~~WILLIAM H. TAFT~~, SECRETARY OF WAR, AND ALEX-
ANDER MACKENZIE, CHIEF OF ENGINEERS OF THE
UNITED STATES ARMY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED APRIL 23, 1908.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1908.

No. 1898.

LEWIS M. HAUPT, APPELLANT,

vs.

WILLIAM H. TAFT, SECRETARY OF WAR, AND ALEX-
ANDER McKENZIE, CHIEF OF ENGINEERS OF THE
UNITED STATES ARMY.

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In the Court of Appeals of the District of Columbia.

No. 1898.

LEWIS M. HAUPT, Appellant,
vs.
WILLIAM H. TAFT, Secretary of War, ET AL.

a Supreme Court of the District of Columbia.

No. 27557. In Equity.

LEWIS M. HAUPT, Complainant,
vs.
WILLIAM H. TAFT, Secretary of War; ALEXANDER MCKENZIE,
Chief of Engineers, Defendants.

UNITED STATES OF AMERICA, *District of Columbia*, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:—

1 *Bill.*

Filed January 9, 1908.

In the Supreme Court of the District of Columbia. In Equity.

No. 27557.

LEWIS M. HAUPT, Complainant,
vs.
WILLIAM H. TAFT, Secretary of War; ALEXANDER MCKENZIE,
Chief of Engineers, Defendants.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the District Court, Holding a Special Term in Equity:

Your petitioner, Lewis M. Haupt, respectfully shows to your Honors the following stated facts:

(1) Petitioner is a citizen of the United States and the State of Pennsylvania, residing in the city of Philadelphia, in said State.

Defendant William H. Taft resides in the city of Washington, in the District of Columbia. He is, and is sued herein as, the Secretary of War of the United States. Defendant Alexander McKenzie also resides in said city of Washington. He is, and is sued herein as, the Chief of Engineers of the United States army.

(2) On the third day of April, 1886, and the twenty-sixth day of November, 1901, letters patent of the United States were issued to complainant for a system of dikes, jetties and breakwaters, and a method of constructing the same, all designed by him. The function of said device was and is to deepen channels in rivers and harbors. The design was novel chiefly in that it includes a single curved jetty with a return curve. The principle involved in the invention is that, through reaction of currents created by such jetty, with the appurtenant dikes, the channel opposite the jetty would be steadily scoured and deepened. One of the features of said design, having in view the direction and control of the currents, was that an opening should be left at the tidal inlet between the inner end of the jetty and the shore for the flow of the tides; but the design forbade that any opening or gap be left at any point between the ends of the jetty itself. All the other designs on which jetties or breakwaters were under construction or provided for in rivers or harbors of the United States at the times of the issue of said patents and the other times hereinafter stated called for two jetties on right lines, parallel or converging and the designs required that both of these jetties be much longer than the single jetty which would be required by complainant's said plan at the same points respectively.

(3) The value of said design and patent to complainant depended and still depends largely upon the demonstration of the practicability and utility of the design in the actual improvement of rivers and harbors, and, since obtaining said patents, complainant has sought and, to the extent hereinafter stated, but no further, has obtained such a demonstration.

(4) Before proposing the adoption of his said design on any projected river or harbor work complainant, in 1887, submitted a thesis thereon to the American Philosophical Society, which is one of the oldest and most eminent of American organizations devoted to scientific research. In compliance with the rules of said society said thesis was submitted to it, not under complainant's real name but under a *nom de plume*. After nine months of consideration by expert engineers and hydrographers who were members of or associated with said society there was awarded to complainant by the society its Magellanic premium for what was described in the award as his "invention and discovery in physical hydrography and its application to the improvement of harbors." Said Magellanic premium is a rare prize, greatly esteemed by scientists, engineers and inventors, having been awarded but five times in more than a century.

(5) Commencing in 1853 a number of attempts had been made by the United States Government and by private enterprisers to secure a channel, navigable for ships of heavy draft, at Aransas Pass,

Texas. From 1880 to 1885 a part of one of two projected jetties was constructed in said harbor under an appropriation of Congress, which had been prompted by an estimate of the engineer corps of the army that such two jetties could be constructed to secure possibly twelve feet of water across the outer bar at a cost of seven hundred fifty-nine thousand, one hundred and eighty-five dollars (\$759,185). In such partial construction of one jetty and auxiliary works five hundred fifty thousand four hundred and sixteen dollars (\$550,416) was expended and a depth of only about seven and one-half ($7\frac{1}{2}$) feet obtained in a channel crossing the bar. These results were reported by the engineer in charge. In 1887 the engineers of said corps made a new estimate, which was communicated to Congress, in which the cost of a channel twenty (20) feet deep across said bar was put at two million fifty-two thousand five hundred and forty-three dollars and seventy-two cents (\$2,052,543.72). No further appropriation was made and no more work was done on said jetties, and before 1890 such part of the one jetty as had been constructed was reported by the engineer in charge to have disappeared; but at that time the said structure remained in said inlet channel, being a serious detriment, rather than an aid, to the deepening of the channel. The improvement of said harbor and of others on the Texas coast was and is difficult because of the frequency and violence of the storms, and the prevalence of trade winds, and it was because of this difficulty and the expected great cost of the project, the construction of said jetties was abandoned by Congress.

(6) Commencing in the year 1890 and continuing its efforts intermittently through the years following, including 1898, the Aransas Pass Harbor Company, a private corporation organized under the laws of the State of Texas, attempted, under authority and franchises granted by an act of Congress approved May 12, 1890, to create in said harbor an adequate channel for all sea-going vessels. Complainant's attention was drawn to said harbor as affording an opportunity for the exemplification of his said design, and, after the failure of other plans which said company had tried, complainant authorized the board of directors of the same to use his patent of April 3, 1886, and construct a break-water in said harbor on his design within a limited time. Said company thereupon caused the necessary surveys to be made and awarded a contract for the partial construction of a curved break-water conforming with complainant's said design. The construction so contracted for was accomplished, but said old jetty at depths of from eight to thirteen feet prevented the predicted scour to fifteen feet by the natural force of the currents, and the funds of said company were then exhausted and it was not able to complete the break-water so planned. After conferences and correspondence with officers of the engineer corps of the United States Army, the directors of said company then agreed, on condition that Congress would make the necessary appropriations, commencing at its next session, and the United States would complete the break-water on said plan, to convey to the United States all its rights and fran-

chises in and about the harbor and the work which had been constructed on said break-water, and a deed to that effect was executed by the President of said company, acting under a resolution of the directors, on the 27th day of March, 1899, a copy of which deed is attached hereto, to be made an exhibit, marked "Exhibit A."

(7) Complainant, being informed of said negotiations between the directors of said company and said officers of the Corps of Engineers, notified said directors in writing that said consent to use his patent was personal to said company and not transferrable
6 by it and that he did not consent to the use of his design on said work by the United States or anyone else than said company.

(8) Both before and after said arrangement was made for the use of complainant's design by the Aransas Pass Harbor Company, complainant attempted to obtain an exemplification of said design through the appropriations of Congress for the improvement of rivers and harbors; but the Chief of Engineers and his advisers and assistants disapproved of said design and, with entire success for several years, they opposed its adoption by Congress for any river or harbor. During the third session of the Fifty-fifth Congress, complainant, when present at a hearing before the Committee of the House of Representatives on Rivers and Harbors, proposed to the committee that he would, himself utilize his patent and design in said Aransas Pass Harbor and would create a channel twenty (20) feet deep to a width of one hundred and fifty (150) feet entirely across said bar if Congress would vote to him, as his compensation, seven hundred thousand dollars (\$700,000.) and he submitted to the committee bonds, with ample sureties, conditioned for his performance of the undertaking. The Committee, because of the opposition and criticism of the officers of the Corps of Engineers, did not recommend the acceptance of that offer, but desiring a demonstration of the effect of that part of said curved jetty which had been constructed, they recommended the removal of said portion of a jetty constructed by the United States in the years 1880 to 1885, and the bill approved March 3, 1899, (55th Congress), making appropriation for improvement of rivers and harbors,
7 contained a paragraph in the words and figures below:

"Improving Aransas Pass, Texas.—For dredging and other improvements of Aransas Harbor, \$60,000: Provided, That the Secretary of War is hereby authorized to contract for the removal of that portion of the old Government jetty in said harbor from the end nearest the curved jetty constructed by the Aransas Pass Harbor Company to the wreck Mary, in such manner as to in no wise interfere with the curved jetty now located in said harbor; And Provided further, That said contract shall not be left by the Secretary of War, nor said work done, until the said Aransas Pass Harbor Company shall have properly released and surrendered all rights and privileges heretofore granted to it in said harbor by Congress, also the jetty constructed in said harbor."

No part of this appropriation was applied to the removal of any

part of said old jetty, and it was not entirely removed until six years later.

(9) At the first session of the 57th Congress complainant again appeared at hearings both of the House Committee on Rivers and Harbors and the Senate Committee on Commerce and sought the adoption of his design by Congress and the completion of said jetty in the Aransas Pass Harbor as planned. He pointed out that, to the end that the completed jetty should scour the channel to the desired depth in the shortest time, a little dredging, involving an expenditure of probably less than ten thousand dollars (\$10,000); would be necessary at points which he indicated; and he then offered to complete the jetty and do the other necessary work, applying his patent and design, for five hundred thousand dollars (\$500,000) under bonds providing forfeiture for a failure to secure the depth promised. He also notified the Committee that if Congress should

8 not provide for the performance of said work by himself, but his patent and design should be applied and the work done by the Corps of Engineers, or some other contractor under the direction of the army engineers, he would not waive his right to compensation for such use of the patent and design, but he said that, in that event, he would arrange that a satisfactory bid should be submitted by a competent and responsible contractor. It became manifest that said Committee favored the adoption by Congress of complainant's design and the completion of the jetty in conformance therewith, and thereupon the Chief of Engineers through an assistant recommended that the appropriation contemplated for this purpose, like all those for other river and harbor improvements, be put in control of the Secretary of War and Chief of Engineers and promised that the engineer corps would cause the work to be done, on said design, "in good faith." Consenting to this recommendation, the Committee caused to be inserted in the pending appropriation bill for the improvement of rivers and harbors a paragraph in the words and figures below, and the same was a part of the bill as passed, the act being approved June 13, 1902:

"Improving Aransas Pass, Texas.—Continuing improvement \$250,000: Provided, That the work at this harbor shall be confined to the completion of the north jetty in accordance with the design and specifications of the Aransas Pass Harbor Company and in continuation of the work heretofore carried out on said jetty by said company, and to such additional work as may be necessary for strengthening such jetty, and for the removal of such part of the old Government jetty and any other hard material which may interfere with the formation of a channel by the natural action of the current."

(10) For the performance of the work so appropriated for in the act of Congress approved June 13, 1902, the United States
9 engineer at Galveston, Texas, prepared specifications and advertised for bids. On examining a copy of said specifications complainant discovered that they differed in several essential particulars from those of said contract let by the Aransas Pass

Harbor Company and provided for a return to the plan of the army engineers. As the result of correspondence opened by complainant on this subject, said engineer at Galveston, under directions from the Secretary of War and the Chief of Engineers, finally requested that complainant submit his suggestions for the conforming of the specifications with those of the Aransas Pass Harbor Company. Complainant thereupon sent to said engineer at Galveston a draft of such amendments as he deemed necessary to bring them into substantial agreement with those of the said company, and said engineer adopted and advertised the same as a part of his specifications for the proposed improvement.

(11) When the specifications had thus been settled, complainant arranged that one Henry C. Ripley, an engineer and contractor of much experience and great skill, should submit a bid on said proposed work lower than any that could be expected from any other source. In closing such arrangement complainant agreed that he would furnish the capital to provide the plant necessary for the work and, as his compensation for the use of such moneys, would receive a share of the small profits which were calculated to result from its performance. Under this agreement said Henry C. Ripley did submit a bid on said work much lower than any other that was submitted and the same was accepted by said engineer at Galveston with the approval of the Chief of Engineers.

10 (12) Said Henry C. Ripley, under the contract so awarded to him, proceeded to construct and between June 23, 1903, and September 17, 1904, did construct that part of said jetty for which said specifications and appropriations provided. Throughout his performance of the work he was greatly hampered and delayed, and the cost of the work greatly increased, by many unfriendly, unauthorized rulings and acts of said engineer at Galveston, of his superiors in the corps of engineers and of the inspectors and other subordinate employees of the United States stationed on the work. During and for said operations complainant, at great inconvenience to himself and the sacrifice of other interests, furnished the larger part of the moneys required, and, he has borne nearly the entire losses caused by said acts of the engineers and other employees of the United States.

(13) Such part of said curved jetty as remained to be constructed when said work of said Henry C. Ripley was completed was thereafter built under two appropriations of Congress. The first of said two appropriations was a clause, in the words and figures below, of the appropriation bill for the improvement of rivers and harbors approved March 3, 1905.

"Improving Aransas Pass, Texas.—Continuing improvement, \$100,000: Provided, That a contract or contracts may be entered into by the Secretary of War for such materials and work as may be necessary to prosecute said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate \$100,000 exclusive of the amounts herein and heretofore appropriated: Provided further, That the amounts herein appropriated and authorized shall be applied to the completion of the project in

accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done, and to such additional work as may be necessary for strengthening the jetty."

11 The second of said two appropriations, and the last required and made for the construction of said curved jetty was made by a paragraph, in the words below, in the act of Congress approved June 30, 1906, making appropriations for sundry civil expenses of the Government.

"*Improving Aransas Pass and Bay, Texas.*—For continuing improvement of Aransas Pass in completion of contract authorization, \$100,000, to be applied to the construction of the project, in accordance with the design and specifications of the Aransas Pass Harbor Company, and in continuation of the work heretofore done, and to such additional work as may be necessary for strengthening the jetty."

Said remaining work for which said two appropriations were made was done, as was authorized by said act of March 3, 1905, under a single contract, Clark and Company, a partnership, taking the contract and doing the work, which was completed during the month of June, 1906.

(14) In the absence of any hard obstruction in the channel, such as the said remains of the work done by the United States itself before the Aransas Pass Harbor Company undertook the improvement of the harbor, and with the aid of the little dredging indicated by complainant at his said discussions with the committees of Congress, a very few months after the completion of the jetty, probably less than a year, would have sufficed, as complainant verily believes, for the permanent clearing of the channel to a depth of twenty (20) feet and to the desired width; but, said dredging being denied, the influence of the jetty on the channel could not be so great or so apparent and it could not fully perform its said function in a less time than three or four years from its completion. This was fully explained to said committees by complainant at said hearing in

12 1902. In fact, the clearing of the channel has been retarded by the small shoal indicated by complainant as calling for dredging and by said remaining portion of said old work done by the United States, which the United States engineers in charge discovered and caused to be removed during the fiscal year ending June 30, 1907. Moreover, it was not possible for said jetty to perform rapidly and effectually its promised function until it was completed over the whole line of the design; for the water flowing through the gap which was not built up necessarily created a strong cross-current, and that greatly weakened the force of the seaward current, flowing along the jetty, and thus retarded the scour of the channel. As it has happened, too, there was during the winters of 1905-1906-1907 an uncommon prevalence and strength of winds from the south or southwest, creating strong currents landward, by which great quantities of sand were carried into the channel, and winds from the north and west, which would inevitably create such seaward cur-

rents as would greatly accelerate the scour of said channel, were remarkably rare and mild.

(15) Up to and since the completion of said last work on said jetty the Chief of Engineers and the subordinate engineers of the army having to do with the jetty have continued to criticize complainant's said design and to attempt to bring it into disrepute and to defeat its full exemplification. Complainant is informed and believes, and upon such information states that, even before said work of said Henry C. Ripley was completed, Captain Edgar Jadwin, the

13 engineer officer at Galveston, Texas, hereinbefore referred to, caused to be published in newspapers in Texas statements that said jetty was not doing the work promised for it and was a failure; and similar derogatory statements have been made by other and higher officers of the Corps of Engineers, publicly and privately, and communications to the same effect have been sent by them to the committees of Congress to defeat legislation sought by complainant, who was not advised thereof at the time and had no opportunity to be heard thereon.

(16) Said jetty and the auxiliary works included in said design have never been fully completed, but the jetty, notwithstanding the disadvantages recited in paragraph 14 hereinbefore, has steadily deepened said channel, and has already accomplished much of what it was intended to do, and is still deepening the channel. The reports made by the Chief of Engineers and the engineer in charge of Galveston for the fiscal years 1904, 1905 and 1906, themselves show a continuous deepening of the channel, which has given a net gain of 10 feet of water entirely across the bar. Said reports state that the maximum reliable depth in the channel, which originally had been six and a half ($6\frac{1}{2}$) feet, was already, while said work of Henry C. Ripley was under way, eleven and a half ($11\frac{1}{2}$) feet; that in June, 1906, but before the closing of the gap in the jetty by said Clark and Company, the minimum depth was sixteen and a quarter ($16\frac{1}{4}$) feet, with a reliable channel at low water for vessels of thirteen (13) feet draft; that in July, 1906, when said gap had been closed there

14 was a channel fifteen (15) feet deep of the width of one hundred and seventy-five (175) feet, while there was over a large part of the channel a depth of twenty (20) feet extending over one hundred and fifty (150) feet in width, and that for the next half mile seaward, from where said work of Henry C. Ripley was done, the depth was from twenty (20) to twenty-nine (29) feet; that said depth of twenty (20) feet extended to within forty (40) feet of the jetty, and the twenty-eight (28) feet of water was then flowing over the bar where formerly there had been but six and a half ($6\frac{1}{2}$) feet, as aforesaid. Since July, 1906, the channel has been still further deepened and widened by the influence of said jetty, but the local engineer in charge, in his report for the fiscal year 1907, said nothing of these results. In a report submitted on December 6th, 1906, in pursuance of a joint resolution of the 59th Congress calling for information regarding the harbor and channel at Aransas Pass, the Board of Engineers having supervision of river and harbor improvements, said:

"The Board has not sufficient information upon which to base

an opinion as to what is now the best method to be pursued to obtain a suitable entrance channel across the bar, nor what the cost of such a channel will be, nor as to the probable location of a means of connecting the deep water of the pass with the commercial port that may be expected to develop. Such data can be obtained only by an additional examination and survey, which is recommended."

The Chief of Engineers referred said report back to said Board with directions that they examine and report further, and a second report was submitted to him by said Board on December 22, 1906, in which the Board approved a plan and estimate submitted by a new District Engineer, recently stationed at Galveston, involving a return to the original two-jetties plan of the army engineers, of

15 which said reaction jetty, with some changes of its contour, was to form a part. Said plan proposed the construction of a second jetty south of and opposite said reaction jetty, the closing of the opening left for the tides at the inner end of the reaction jetty, the removal of the outer end of the reaction jetty, and the possible extension of both jetties a distance of about one thousand seven hundred and fifty (1750) feet, and the construction of trestles, railroad tracks and other works, the building of a dredge to create and maintain a channel; the cost of said construction being estimated at one million two hundred and ninety thousand dollars (\$1,290,000), and the maintenance of the improvement at seventy-five thousand dollars (\$75,000) per annum.

(17) The Chief of Engineers, in his report for the fiscal year 1907, did not recommend the small appropriation required for the dredging indicated by complainant, and that dredging has not been done. Under the influence of his expressions and those of the subordinate engineers of the Corps appropriation was made by said Congress, in the act for the improvement of rivers and harbors approved March 2, 1907, for a commencement of the construction recommended in said report of the Board of Engineers of December 22, 1906. The text of the appropriation follows:

"Improving Harbor of Aransas Pass, Texas: Continuing the improvement in accordance with the plans submitted in its report of December twenty-second, nineteen hundred and six, by the Board of Engineers created by authority of section three of the River and Harbor Act of June thirteenth, nineteen hundred and two, two hundred thousand dollars: *Provided*, That the Secretary of War may enter into a contract or contracts for such materials and work as may be necessary to prosecute said project, to be paid for as appropriations may from time to time be made by law, not to

16 exceed in the aggregate two hundred and ninety thousand dollars, exclusive of the amounts herein and heretofore appropriated."

(18) No offer was made by the Chief of Engineers or his subordinates to contract for the construction work in said harbor authorized by the 59th Congress until October 21, 1907. On that date specifications for such work were published by the engineer in charge at Galveston, with an invitation for bids and a notice that the bids would be opened on November 21, 1907. When the bids

were opened said District Engineer accepted one which had been submitted by David M. Picton, a resident of Texas, and a contract for the performance of the work by him was signed by said District Engineer and him and approved by the Chief of Engineers.

(19) Said specifications of October 21, 1907, required that the work so provided for should be commenced within sixty days after the notification of the contractor of the approval of the contract by the Chief of Engineers. Complainant is informed and believes, and on such information states that said David M. Picton has not yet commenced said work, but is making inquiries regarding the physical conditions of the project and arranging to obtain his materials, with a view to an early commencement of operations.

(20) Said works now planned by the engineer officers in actual practice, in the Aransas Pass Harbor and others where the conditions of topography, climate, winds, current and bottom are the same, would not, as would said reaction jetty, entirely remove the bar, but would merely carry it farther seaward and finally leave
17 it barely beyond the outer ends of the jetties. But the theory and plan of its operation is so radically different from that of said existing jetty that, in any event, it would inevitably efface complainant's design and thus prevent its full demonstration. Even though it should not be fully completed in accordance with the original design, and even though the dredging indicated by complainant should not be done, said jetty will within two or three years from this time scour a channel to the full depth and width desired and promised, and if said dredging were done at this time, the jetty would scour the channel to such depth and width within less than a year, and it would permanently maintain the channel so obtained.

(21) Complainant is informed and believes, and on such information states that the actual cost to the United States of said reaction jetty has been something less than six hundred thousand dollars (\$600,000), and that the cost of said works now projected by the army engineers, including the sums expended for and on the existing structures to be utilized, will be as much as two million dollars (\$2,000,000).

(22) The chief consideration to complainant in the said arrangements which he proposed to the committees of the 55th Congress, much more important and desired by him than any money compensation to be awarded him for the use of his design and patent on said individual improvement, was that the utility of said design should be fully demonstrated. Complainant made it clear to said committees, and they fully understood that all his offers had
18 been and were made on the condition that said reaction jetty should be carried by Congress to completion in substantial conformity with the plans theretofore prepared. If said works now planned by the Corps of Engineers be constructed such demonstration of his said design will be impossible and the design and patent will be greatly discredited and complainant thereby will be irreparably damaged. Complainant's resources have been so impaired through said unfriendly and unlawful acts of the officers of the Corps

of Engineers that, upon the destruction of said demonstration of his design, he could not himself furnish or command the capital which would be required for another demonstration of the same.

(23) There is no emergency of any kind whatever calling for the performance at this time of said work covered by the contract of said David Picton. On the contrary if that work be deferred for some considerable time, conditions will necessarily be better for the accomplishment of the object of said present project; said reaction jetty will in the meantime have scoured away much sand, and so increased the depth and width of the navigable channel.

(24) Under the laws of the United States and the regulations of the War Department, the awarding of all contracts for improvements in rivers and harbors and the supervision of the performance of the work so contracted for is the duty of the District Engineers and of the Engineer Corps, under the direction and subject to the approval, in all particulars, of the Chief of Engineers, but the acts of the Chief of Engineers himself in those matters are subject to the control of the Secretary of War.

The premises considered, complainant prays that said William H. Taft, as Secretary of War, and said Alexander McKenzie, as Chief of Engineers, be made parties defendant to this bill and required, on or before the next rule day of this Court, to answer the exigencies of the same fully and completely; that a restraining order and a temporary injunction may issue to them forbidding the performance of said work for which a contract has been awarded to said David M. Picton and any and all other interference with said existing jetty in the Aransas Pass Harbor, or with the operations of the same, and directing defendant Alexander McKenzie to give to all proper engineers or other officers or functionaries of said Corps of Engineers such orders and directions as may be necessary for restraining the performance of said work by said David M. Picton or other interference with said existing jetty or its operations; that at the hearing said injunction be continued in effect for not less than four years from the date of the filing of this bill or until Congress shall have provided for compensation to him for said use of his design and said impairment of its value and he shall have received the award so authorized; and he prays that he may have all such further and other relief as to your Honors may seem due to him.

BENJ. CARTER,
O. H. DOWELL,
Solicitors for Complainant.

20 NOTE.—Each of the defendants is required to answer each and every paragraph of this bill from 1 to 24 inclusive, but as to each of them the requirement of an oath to his answer is waived.

BENJ. CARTER,
O. H. DOWELL,
Solicitors.

STATE OF PENNSYLVANIA, *County of Philadelphia:*

Before me the subscriber, a Notary Public in and for said State and County, appeared this day, Lewis M. Haupt, complainant in the foregoing bill in equity, who, being sworn by me, made oath, that those of the allegations of said bill which are made as of his own knowledge are true, and that those of the allegations thereof which are made as of his information and belief he verily believes to be true.

LEWIS M. HAUPT.

Subscribed and sworn to before me, this 30th day of December, 1907.

[SEAL.]

J. K. LEE SMITH,
Notary Public, 3602 Lancaster Av., Phila., Pa.

Commission Expires February 2nd, 1910.

21

EXHIBIT A.

Filed January 9, 1908.

THE STATE OF TEXAS, *County of Bexar:*

Know all men by these presents: That:

Whereas. The Board of Directors of the Aransas Pass Harbor Company heretofore to wit: On the 16th day of December 1898, duly passed the following resolutions:

Be it Resolved, that the Aransas Pass Harbor Company hereby releases to the United States Government all its rights and franchises, received from said Government to secure deep water at Aransas Pass, Texas: and;

"Be it Further Resolved, that said Company convey to the United States Government the Stone Breakwater which it has constructed at said Pass of Aransas, in its efforts to secure deep water; Provided, that the United States Government take charge and control of the improvements at Aransas Pass, and make an appropriation at this session of Congress to prosecute the work in securing deep water across the bar at said Aransas Pass," and

Whereas on the second day of January, 1899, at a special stockholders' meeting of the stockholders of said Aransas Pass Harbor Company duly called, the following resolution was unanimously adopted:

"Whereas, the Board of Directors of the Aransas Pass Harbor Company have heretofore duly passed the following resolution:

"Be it Resolved that the Aransas Pass Harbor Company hereby releases to the United States Government all its rights and
22 franchises received from said Government to secure deep water at Aransas Pass, Texas, and

Be it Further Resolved that the said company convey to the United States Government the Stone Breakwater which it has constructed at said pass of Aransas in its efforts to secure deep water;

Provided, that the United States Government take control of the Improvements at Aransas Pass, and make an appropriation at this session of Congress to prosecute the work in securing deep water across the bar at said Aransas Pass." and

Whereas, the stockholders of said Aransas Pass Harbor Company believe it to be — the advantage of said Company to in all things ratify and confirm said resolution;

Therefore be it Resolved that the Aransas Pass Harbor Company hereby releases to the United States Government all its rights and franchises received from said Government to secure deep water at Aransas Pass, Texas, and

Be it Further Resolved that the said company convey to the United States Government the Stone Breakwater which it has constructed at said pass of Aransas in its efforts to secure deep water; Provided, that the United States Government take control of the Improvements at Aransas Pass, and make an appropriation at this session of Congress to prosecute the work in securing deep water across the bar at said Aransas Pass." and

Whereas, the stockholders of said Aransas Pass Harbor Company believe it to be — the advantage of said Company to in all things ratify and confirm said resolution;

Therefore be it Resolved that the said resolutions of the
23 said Board of Directors be, and the same is hereby, in all things ratified and approved and the President of this Company is hereby authorized to make conveyance of the franchises and property described in said resolutions to the United States Government in accordance with said resolutions: Provided, that the said United States Government take control of the improvements at Aransas Pass and make an appropriation at this session of Congress to prosecute the work in securing deep water across the bar at Aransas Pass; and,

Whereas by provision in the River and Harbor Act of March 3rd, 1899, the Government of the United States has taken control of the improvements at said Aransas Pass, and made an appropriation to prosecute the same with a view of securing deep water across the bar at said Pass:

Now, Therefore, in consideration of the premises, and for other good and valuable considerations hereunto moving, the said Aransas Pass Harbor Company has granted, conveyed, released and surrendered, and does hereby grant, convey, release and surrender, unto the United States of America, all and singular the rights and franchises, and privileges in the Harbor at said Aransas Pass heretofore granted to said Company by Congress, together with the Jetty constructed in said Harbor and the Stone Breakwater erected by said Company at said Pass.

Witness the signature of said Company by its president, duly attested by its secretary, this the 27th day of March, 1899.

ARANSAS PASS HARBOR COMPANY,
By THOS. H. FRANKLIN, *President*.

[SEAL.]

Attest:

T. B. WHEELER, *Secretary*.

24 THE STATE OF MARYLAND, *City of Baltimore:*

Before me the undersigned authority on this day personally appeared Thomas H. Franklin, President of the Aransas Pass Harbor Company, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacity therein set forth and as the act and deed of said Aransas Pass Harbor Company.

Given under my hand and seal of Office this 27th day of March, A. D. 1899.

[SEAL.]

ARTHUR W. ROBSON,
Notary Public, Baltimore City.

Filed for Record May 3d, 1899, at 3:30 o'clock, P. M. Recorded May 6th, 1899, at 11.20 o'clock, A. M.

JOHN C. HERRING,
Clerk Co. Court, Aransas Co.

THE STATE OF TEXAS, *County of Aransas:*

I, John C. Herring, Clerk County Court of Aransas County, Texas, do hereby certify that the foregoing instrument of writing contains a true and correct copy of the Original Conveyance, from the Aransas Pass Harbor Company to the United States of America, as the same appears of Record in Book "S" on pages 125, 126, 127, Deed Record of Aransas County, Texas.

25 *Witness my hand and the seal of the County Court of Aransas County, Texas, this 30th day of November, 1900.*

JOHN C. HERRING,
Clerk County Court of Aransas County, Texas.

[District Court of Aransas County, Texas.]

26

Demurrer.

Filed February 3, 1908.

In the Supreme Court of the District of Columbia, Holding an Equity Term.

Equity. No. 27557.

LEWIS M. HAUPT, Complainant,

vs.

WILLIAM H. TAFT, Secretary of War; ALEXANDER MACKENZIE,
Chief of Engineers, Defendants.

Come now the defendants, William H. Taft, Secretary of War, and Alexander Mackenzie, Chief of Corps of Engineers United States

Army, and showing to the Court that it does not appear in and by said bill of complaint filed herein and by reason of any allegation therein, that there is any equity in said bill, or any right, title, or interest in the complainant to secure the relief therein prayed, or of any relief whatever, and it does not appear that there is any jurisdiction in this Court to grant the relief prayed, or any relief whatever, or jurisdiction to review or make an order with respect to the subject matter stated in said bill, do demur to said bill and say that the same is bad in substance on the grounds, among others, following:

1. It does not appear in and by said bill that the complainant has any right, title or interest to interfere with the defendants in carrying out the provisions of the Act of Congress approved
27 March 2, 1907, or any contract made by the proper authorities of the United States in accordance with said Act.

2. It does not appear in and by said bill that the said complainant has any interest in the contract made by virtue of said Act of Congress, or in any of the jetties about to be erected, or in the jetty already erected.

3. It does appear in and by the said bill that the defendant, William H. Taft, is sued as Secretary of War, and that the defendant Alexander Mackenzie, is sued as Chief of Engineers, United States Army, and that the jetties mentioned in said bill, about to be erected, are the property of the United States, and that the said suit, is a suit against the United States.

4. That the several acts of the said defendants sought to be enjoined by said suit are being performed by said defendants in the exercise of the administrative power of the Government of the United States, and are in accordance with the said acts of Congress, and this Court is without jurisdiction to interfere with, control or enjoin such acts.

5. It does not appear by said bill that any actual damage is done or threatened to the complainant which would give this Court any jurisdiction to entertain said bill.

6. It does appear in and by said bill that the act of Congress of March 2, 1907, entitled "An Act Making Appropriations for the Construction, Repair and Preservation of certain Public Works on Rivers and Harbors, and for other Purposes," appropriates large

sums of money for the construction of and continued construction, repair and preservation of public works of the
28 United States, and that in and by said act there is an appropriation for continuing the improvement in the harbor at Aransas Pass, in accordance with the plans submitted by the Board of Engineers in its report of December 22, 1906, created by authority of section 3 of the River and Harbor act of June 13, 1902, and that the said acts mentioned in said bill that are about to be done by said defendants are to be done in accordance with said act of Congress, and that this Court has no jurisdiction to interfere by injunction or otherwise, with the proper officers of the United States in carrying out the said act of Congress.

7. That there is no such injunctive remedy of the character prayed for in said bill.

DANIEL W. BAKER,
*Attorney of the United States in and for the District
of Columbia, Solicitor for Defendants.*

DISTRICT OF COLUMBIA, ss:

We, William H. Taft and Alexander Mackenzie, defendants in the above-entitled bill, do say that we have read the foregoing demurrer by us subscribed, and state that the same is not interposed for delay.

WM. H. TAFT.
ALEXANDER MACKENZIE.

29 Subscribed and sworn to before me this 1st day of February, A. D. 1908.

[SEAL.]

JNO. B. RANDOLPH,
Notary Public, D. C.

I, Daniel W. Baker, Attorney of the United States in and for the District of Columbia, do hereby certify that I am Solicitor for the defendants in the above-entitled cause, for whom the above demurrer has been signed, and that in my opinion the same is well founded in law.

DANIEL W. BAKER,
*Attorney of the United States in and for the District
of Columbia, Solicitor for Defendants.*

Defendants' Answer to Rule to Show Cause.

Filed February 3, 1908.

In the Supreme Court of the District of Columbia. In Equity.

No. 27557.

LEWIS M. HAUPT, Complainant,
vs.

WILLIAM H. TAFT, Secretary of War; ALEXANDER MACKENZIE,
Chief of Engineers, Defendants.

30 These defendants, reserving to themselves all benefit of the many imperfections contained in the bill of complaint, and the lack of jurisdiction of this Court over this case, both by reason of the status of complainant and of these defendants as officers of the United States, and by reason of the subject matter of this suit, and urging the Court to consider these fundamental obstacles to the maintenance of this suit on the hearing of the answer to the rule to show cause the same as if they had been more fully set out herein, and omitting to reply in this answer, without waiving their right to

object thereto, to the many immaterial, irrelevant. and incompetent allegations contained in the said bill, for answer to the rule and to the allegations of the bill, which these defendants are advised should be noticed in answer to the rule, answering say:

They respectfully submit jointly and severally that there are no allegations contained in the said bill which give to this Court any jurisdiction to entertain the suit because of any right, title or interest of the said complainant set out in the said bill nor as against these defendants, or either of them, who are sued in their official capacities as officers of the United States, and because they are acting for the United States in executing certain laws of Congress. Nor does the bill, these defendants submit, show that the complainant has any property in the jetty referred to in the said bill, or any interest therein which would invest him with a status whereby he might invoke the aid of a court of equity. And finally, these defendants submit,

31 that upon the whole bill it definitely appears that they are proceeding in their capacity as officers of the United States, in executing certain work authorized by Act of Congress Approved March 2, 1907, in the construction of certain jetties at Aransas Pass.

These defendants further say that to their best information and belief said complainant transferred for the purpose of building a jetty at Aransas Pass the use of his alleged patents to the Aransas Pass Harbor Company, and that the said Aransas Pass Harbor Company attempted to build a jetty in accordance therewith; that complainant never had any interest in the said jetty attempted to be erected by the said Aransas Pass Harbor Company, and that said Aransas Pass Harbor Company transferred all its right, title and interest to the then existing jetty at Aransas Pass, to the United States, and executed and delivered a proper and sufficient deed thereof, dated March 27, 1899. The said deed is set out as Exhibit A in complainant's bill.

That thereafter, Congress, in several of the river and harbor appropriation acts, appropriated money for the purpose of completing the said jetty conveyed by the said Aransas Pass Harbor Company, in accordance with the designs and specifications of the said Company, and also appropriated money for the purpose of strengthening the said jetty.

That the Act of Congress of June 13, 1902, provided for a Board of Engineers for Rivers and Harbors, for the purpose of making recommendations in regard to public works in rivers and harbors;

32 that on December 6, 1906, the said Board, in response to a resolution of the Committee on Rivers and Harbors of the House of Representatives, made a report to the defendant, Alexander Mackenzie, Chief of Engineers, United States Army, and that said report was forwarded by the said Chief of Engineers to the Chairman of the said Committee. A copy of said report is filed herewith, marked Exhibit A. That on December 17, 1906, the Chairman of the Committee on Rivers and Harbors addressed a letter to said defendant, Alexander Mackenzie, Chief of Engineers, United States Army, which letter requested that the report be re-

turned to the said Board of Engineers for Rivers and Harbors, and "that they examine all available data, and determine whether they can formulate a plan for further improvement." A copy of said letter is filed herewith, marked Exhibit B. That said additional report was made and forwarded to the said Chairman of the Committee on Rivers and Harbors, on December 26, 1906, a copy of said letter, with a report dated December 19, 1906, from Edgar Jadwin, Major, Corps of Engineers, United States Army, and said additional report, dated December 22, 1906, being embraced in 59 Congress, Second Session, Committee Document Number 5, a copy thereof being filed herewith, marked Exhibit C. That in said last mentioned additional report, the said Board states that they believe that a good entrance can never be maintained by a single jetty, but submit to Congress for their determination the advisability of further experimenting with the said single jetty, and that after considering the said last mentioned report, there was enacted by Congress, in the Rivers

and Harbors Act of March 2, 1907, the following provision:
 33 "Improving Harbor at Aransas Pass, Texas: continuing the improvement in accordance with the plans submitted in its report of December twenty-second, nineteen hundred and six, by the Board of Engineers created by authority of section three of the Rivers and Harbors Act of June thirteenth, nineteen hundred and two, two hundred thousand dollars: Provided, That the Secretary of War may enter into a contract or contracts for such materials and work as may be necessary to prosecute said project, to be paid for as appropriations may from time to time be made by law, not to exceed in the aggregate two hundred and ninety thousand dollars, exclusive of the amounts herein and heretofore appropriated."

These defendants further say that, acting under this specific authority of the aforesaid Act, in their official capacities as officers of the United States, they entered into a contract to prosecute this work. On December 24, 1907, a contract was entered into by the United States with David M. Picton, all the formalities and proper conditions required in the making of such contracts having been strictly followed, and work is about to be begun in accordance with said contract.

And further answering, these defendants submit that the complainant has no right to interfere with them in the discharge of their official duties, and has no right in this Court to prevent these defendants from carrying out the improvements provided for in said Act of Congress of March 2, 1907.

And defendants further say that it is of great public interest that the said work authorized by said Act of Congress of March 2, 1907, at Aransas Pass, be prosecuted with expedition; that the contemplated improvements provided for in said Act are necessary for making Aransas Pass a suitable harbor to serve the demands of commerce

and navigation, and that the interference of this Court with
 34 said improvements would be a public detriment.

WM. H. TAFT.

ALEXANDER MACKENZIE.

DANIEL W. BAKER,
Solicitor for Defendants.

DISTRICT OF COLUMBIA, ss:

William H. Taft and Alexander Mackenzie, defendants herein, each being first duly sworn according to law, on oath say that they have read the foregoing answer by them subscribed, and know the contents thereof; that the matters and things therein stated of their own knowledge are true, and those stated on information and belief they believe to be true.

WM. H. TAFT.
ALEXANDER MACKENZIE.

Subscribed and sworn to before me this 1st day of February, A. D. 1908.

[SEAL.]

JNO. B. RANDOLPH,
Notary Public, D. C.

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EXHIBIT A.

Filed February 3, 1908.

THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS,
COLORADO BUILDING,
WASHINGTON, D. C., *December 6, 1906.*

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C.:

GENERAL: 1. By reference of the Chief of Engineers, U. S. Army, the Board of Engineers for Rivers and Harbors has received a resolution of the Committee on Rivers and Harbors of the House of Representatives which is in part as follows:

"Resolved, by the Committee on Rivers and Harbors of the House of Representatives, That the Board of Engineers for Rivers and Harbors, constituted by the River and Harbor Act of June 13, 1902, be, and they are hereby requested to further consider the reports on preliminary examinations and surveys of the following named localities or projects, and make reports thereon, with such recommendations as may be deemed advisable, as is contemplated by the said Act creating such Board, or any Act supplemental thereto, including cases in which reports as to desirability have not yet been made.

Aransas Pass, Texas.

* * * * *

2. In its study of the needs of this port, the Board has reviewed the history of the improvements heretofore undertaken by the United States and by private parties, as published in the Annual Reports of the Chief of Engineers, a report of a Board of Engineer Officers upon a deep harbor on the northwest coast of the Gulf of Mexico (published on p. 1781 of the Annual Report of the Chief of Engineers for 1890), a report of a Board of

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Engineer Officers, dated November 22, 1897, upon an examination of the improvement of Aransas Pass, Texas (published in House Document No. 137, 55th Congress, 2nd Session), and a subsequent report of the same Board of December 17, 1898 (published in House Document No. 119, 55th Congress, 3rd Session).

3. On November 23, 1906, an inspection of the Pass was made by a committee of the Board, and on the 24th a well advertised public hearing was held at Corpus Christi by the same committee. At this hearing a number of papers were presented by interested parties and a number of persons were heard upon the commercial importance of the locality and as to the necessity for the further improvement of the port.

4. The history of the improvement of Aransas Pass is briefly as follows:—Between the years 1880 and 1889, work by the United States was in progress on this Pass, work being carried on here simultaneously with the improvement of other ports along the northwestern coast of the Gulf of Mexico. By the Act of March 3, 1889, Congress authorized the organization of a Board of Engineer Officers to consider and report upon the most eligible location for a deep water harbor on the northwest coast of the Gulf of Mexico. Such a Board was organized, and after a thorough consideration of this

subject, submitted its report on December 18, 1889, recommending as the most feasible location for such a deep water harbor the port of Galveston. In consequence of the report of this Board the United States seems to have ceased work at Aransas Pass and to have concentrated its action at the port of Galveston. As a result of this concentration of work, Galveston is now a deep and flourishing port.

5. After the work at Aransas Pass had been stopped by the United States the improvement of this Pass was undertaken by a private corporation which had obtained certain rights from Congress and from the State of Texas. Under this company work was in progress from 1892 to 1897, when, owing to financial difficulties, the company was compelled to stop work without having completed the work as planned by them.

6. The plans under which the work was carried on by this company were, it is claimed, much less expensive and were diametrically opposed, both in practice and in theory to the work which had been previously done by the United States; and, as a result, not only was the jetty previously constructed by the United States of no assistance to the work done by the company, but it interfered with that work, and the plans of the company provided for the removal of a portion of this jetty.

7. After the cessation of the work by the company, operations were resumed by the United States, but they have been restricted by the direction of Congress to the completion of the plans proposed by the engineers of the company. These plans have now been carried out in full.

8. In its present condition the entrance to Aransas Pass is not available for vessels of large draught. In the Annual Report of the District Officer it is reported that there was,

according to a survey made in June last, an available channel 15 feet deep, but it was reported to the committee of the Board at the public hearing in Corpus Christi that it is not now possible, with safety, to navigate the channel with a vessel drawing more than 12 feet on account of the narrowness and crookedness of the channel; and furthermore, that for safe handling the length of the vessel must not be great and the weather conditions must be favorable.

9. Immediately inshore of the gorge at Aransas Pass there is available for vessels an anchorage of considerable area, having a depth of 25 feet and even more, but there are at present no docks or wharves at which vessels can lie for loading or unloading. Before Aransas Pass can become a deep water port, two things are necessary first, a channel across the bar available for large vessels, and secondly, wharves and docks or other provisions for the loading and unloading of vessels. Such docks and wharves can be constructed on the islands in close proximity to the deep water anchorage just mentioned, or along the shores of Aransas Bay or Corpus Christi Bay. Before the bay shores could be used, deep channels of considerable length must be dredged. Before docks and wharves can be constructed on the shores of the islands bordering upon the deep water anchorage, a large amount of filling must be done, for these

39 islands are generally very low and are subject to overflow at very high water; furthermore, the use of these islands for this purpose requires that rail connections must be constructed to the mainland across a considerable length of intervening water.

10. The question of improving this entrance has been under consideration in the past by a number of Boards of Engineer Officers, and these Boards have, without exception, submitted favorable reports. Even the Board of 1889, which selected Galveston as the port on the northwest coast of the Gulf of Mexico which it was most available to improve, stated that in its opinion the harbor at Aransas Pass was worthy of great consideration and of a vigorous prosecution of the work of improvement.

11. In this review of the work, careful consideration has been given to previous reports upon the subject and to the commercial needs of the large area naturally tributary to Aransas Pass, as stated in the various papers and arguments presented at the public hearing, and the Board is of the opinion that there is a commercial necessity for an additional deep water harbor on the coast of Texas, to the Westward of Galveston, and that the most feasible point for such a harbor is at Aransas Pass; and the Board is of the opinion that the creation of such a deep water port at this Pass is justified by the commercial interests involved.

12. The Board has not sufficient information upon which to base an opinion as to what is now the best method to be pursued to obtain a suitable entrance channel across the bar, nor what the cost of such a channel will be, nor as to the probable location of and means of connecting the deep water of the Pass with the
40 commercial port that may be expected to develop. Such

data can be obtained only by an additional examination and survey which is recommended.

Respectfully submitted,

D. W. LOCKWOOD,
Colonel, Corps of Engineers.
R. L. HOXIE,
Lieut. Colonel, Corps of Engineers.
CLAS. D. TOWNSEND,
Major, Corps of Engineers.
E. EVELETH WINSLOW,
Major, Corps of Engineers.
CHARLES W. KURTZ,
Major, Corps of Engineers.

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EXHIBIT B.

Filed February 3, 1908.

Committee on Rivers and Harbors, House of Representatives, U. S.

WASHINGTON, D. C., Dec. 17th, '06p.

General A. Mackenzie, Chief of Engineers, War Department, City.

MY DEAR GENERAL: I send you herewith the report of the Board of Review on the Aransas Pass project. If you approve I shall be glad if you would return this report to the Board with the request that they examine all available data and determine whether they cannot formulate a plan for further improvement.

I am informed that a local officer has such data as may be required.

Yours very respectfully,

T. E. BURTON.

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EXHIBIT C.

Filed February 3, 1908.

59TH CONGRESS,	COMMITTEE ON RIVERS AND HARBORS,	{	<i>Committee Document</i>
2d Session.			
	House of Representatives, U. S.		No. 5.

Aransas Pass, Texas.

Letter from the Chief of Engineers, U. S. Army, Transmitting Report of the Board of Engineers for Rivers and Harbors on Aransas Pass, Texas.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, December 26, 1906.

MY DEAR MR. BURTON: 1. The additional report on Aransas Pass, which you asked from the Board of Engineers for Rivers and Har-

bors, has just come in, and is sent you inclosed. You will note that it is accompanied by a plan with estimate of cost of additional work at the locality.

2. If any legislation authorizing new work is to be enacted, I believe that the plan proposed should be followed in all essential features; but that considerable elasticity should be permitted, as the work must be largely tentative; and I would suggest that in case this plan be named in the appropriation item the Secretary of War be authorized at the same time to modify it, if found necessary to do so.

Very respectfully,

A. MACKENZIE,
Brig. Gen., Chief of Engineers, U. S. Army.

Hon. T. E. Burton, Chairman Committee on Rivers and Harbors,
U. S. House of Representatives.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
WASHINGTON, *December 19, 1906.*

GENERAL: 1. In compliance with your oral instructions, I have the honor to submit the following report and estimate for continuing work at Aransas Pass, Texas.

2. The Haupt jetty has been built between stations 20+0 and 77+50. This is understood to be the length which was adopted by the Aransas Pass Harbor Company. The original report of the consulting engineers of the Aransas Pass Harbor Company contemplated a somewhat greater length, viz. 6,200 feet. The report concludes with the following statement:

If a more rapid development of depths is desired than will result from natural causes, deepening may be facilitated by dredging or other auxiliary appliances. Since the forces necessary to maintain a channel are much less than those required to create it, a channel once developed and protected from silt, as this will be, may be maintained by the natural tidal currents from the bays; hence the cost of maintenance under the plan proposed would be a minimum.

The results obtained by the jetty are shown on the accompanying blueprint. The first question is naturally whether anything further should be done along the lines of the so-called Haupt plan. Simply as an engineering matter, I cannot recommend dredging under present conditions. The channel along the jetty is such that it would be unsafe to attempt to utilize the dredge Comstock on the work. It is possible that a smaller and lighter draft dredge could work there on the most favorable days. In removing a portion of the old Government jetty the use of large charges of dynamite was resorted to. This made large craters in the bottom, but these craters filled up ordinarily within a few hours. The sand shoal working from the west toward the channel is extremely aggressive. I am therefore of the opinion, as an engineering matter, that the expenditure of money for dredging, under existing conditions, would be out of proportion to any benefit to be derived. At the same time I feel that the question of whether this should be done is one which should be deter-

mined in the light of the extent to which Congress may wish to go in the experiment with the Haupt plan.

3. I believe the best plan for the improvement of this harbor in its natural condition was substantially as recommended by Major Ernst, by jetties about 2,000 feet apart, located nearly normal
45 to the depth contours. This is of course impracticable at present, without going to an enormous expenditure in removing the Haupt jetty. The Robert board reported that in view of the existence of the part of this jetty constructed at the time of the board's report, the harbor would never be as good as if that part of the jetty had not been built. Since then much stone has been added to the jetty in order to complete it. The situation in this respect is therefore stronger than it was at the time of the Robert board's report. It seems plain that any plan submitted must acknowledge the existence of this jetty and in addition utilize as much of it as possible. With this idea in view, the first step is to connect this jetty with St. Joseph Island. The proposed line of connection is shown on the accompanying blueprint. The Robert board proposed making the connection with a sill, which was expected to settle into the ground so that none of it will be above low water. If only this much is done, there will be a certain motion of sand along the shore into the channel, which will have to be taken care of by the current, in addition to the amount which it will have to take care of if water is admitted only from the outer ends. It is therefore believed that the connection should be brought up to practically the height of the jetty. It is expected that a considerable portion of the rock will settle into the sand, probably nearly 50 per cent. An allowance for this has been attempted in the estimate.

4. Estimates have been submitted for a cut through Turtle Cove
46 to Corpus Christi Bay. This will increase the volume of water flowing in and out of the pass: the flow of this water will probably cause a change in the direction of the current in the gorge and may eat away part of the end of St. Joseph Island. To prevent this action from causing the channel to break out north of the jetty, an estimate is submitted for a mound of stone across the island. The width of the gorge at present is about 750 feet. It has been in times gone by as great as 3,040 feet. The pass was formerly considerably to the north of the present position, and moved steadily to the south, until its motion was arrested by the construction of a strong riprap revetment on the head of Mustang Island.

5. The Robert board contemplated a south jetty on the line of the old Government jetty to the wreck Mary, thence running in a direction generally parallel to the part of the Haupt jetty then constructed and about 800 feet south of its outer end; the jetty to be carried to 20 feet of water. It recommended removing a portion of the foundation of the Haupt jetty then in place for a length of about 1,000 feet from the outer end and the construction of a new outer end parallel to and about 1,250 feet from the south jetty.

I now recommend that the south jetty be constructed, starting at the point where the old Government jetty crosses the shore line and running in a straight line to a point 1,250 feet from the outer end

of the Haupt jetty. It should be made of such construction as will stand in these waters. An attempt was made to make the north jetty 10 feet wide on top, but it was found necessary to make it wider at the outer end. It is probable that the south jetty should be brought up to a height of about 4 feet above low water and that it can be built with a width of about 10 feet where it leaves the shore, increasing to about 20 feet at the outer end on top with side slopes of 2 on 3. Both jetties will probably have to be extended shortly after the completion of this work for a considerable distance into the Gulf, as it is expected that the sand will bank up against the outsides of the jetties. There will be some change in the direction of the channel at the gorge, which will probably have its influence on the position of the channel elsewhere between the jetties. It cannot be stated positively that a portion of the Nelson jetty and more of the old Government jetty may not have to be removed. I deem it better, however, to leave these matters to be developed practically, and to be attempted later if found necessary. There is only a little of the Nelson jetty and no portion of the old Government jetty now visible. The cost of their removal will be small as compared with the expense of removing any considerable portion of the Haupt jetty. If required now positively to indicate a direction for the extension beyond the outer end of the Haupt jetty, I would follow the lines indicated on the blueprint, but no estimate of this is submitted now as additional light will be practically thrown on the problem by the time the south jetty reaches this point. Among other things, a better idea will be had of the direction and location of the channel between the jetties and its natural point of exit. Should it insist on hugging the Haupt jetty, it may be necessary to remove the outer thousand feet of this jetty and to extend the north jetty substantially as indicated by the red line. If, as a result of the conditions already stated and possibly by some additional work on the Nelson and old Government jetties, it can be brought to leave the jetties at a reasonable distance away from either jetty, the natural course would be to extend the north jetty substantially as indicated in yellow. It may also be that the direction of the channel will be such as to suggest a change of direction of the extensions. No estimate is submitted at present for the work beyond the outer end of the existing north jetty, although it may be stated that the average cost per linear foot of the Galveston jetties, in 20 feet of water, was about \$200 per foot. It seems probable that the most advantageous way to construct the work recommended will be by building trestles along the lines indicated, moving the loaded cars on barges from the railroad terminal to wharves at the end of the trestles and running the cars out on these trestles. The estimates are based on this plan, although the contractor should probably be left free to follow a better method if he can develop one. The entrance of the Turtle Cove channel may cause some erosion at the northwest end of Mustang Island near the existing revetment. No estimate is submitted for an extension of this revetment. No estimate is submitted for a shore arm from the wharf on Mustang Island to the Gulf shore line. It is not believed that any appreciable amount of rock will be

required for either of these purposes. Should this not prove correct,
 49 it will be possible to readily divert such amount of rock as
 may be needed from that being used for the construction of
 jetties. The estimated cost of the work is as follows:

North jetty (shore branch):

1,850 feet of trestle, at \$2.90 per foot.....	\$5,365.00
1,700 feet of trestle, at \$3.73 per foot.....	6,341.00
1,850 feet of mound, at \$15.55 per foot.....	28,770.00
1,700 feet of mound, at \$35 per foot.....	59,500.00
Transfer wharf and apron.....	5,000.00
Allowance for consolidation, settlement and contin- gencies	44,180.00
Total shore branch north jetty.....	<u>149,156.00</u>

South jetty (6,000 feet to point abreast of present
 end of north jetty):

2,400 feet shore trestle (no riprap mound) at \$3.38...	8,112.00
3,600 feet Gulf trestle, at \$5.31.....	19,116.00
2,250 feet riprap mound (shore branch, 2,400 to 4,650), at \$43.....	96,750.00
1,350 feet riprap mound (4,650 to 6,000), at 113.31..	152,968.50
Transfer wharf and apron.....	5,000.00
Allowance for consolidation, settlement, and contin- gencies	57,597.00

Total south jetty to 6,000 feet from wharf..... 339,543.50

It is very probable that after the south jetty is constructed, and it
 will be safe for a dredge to work between the jetties, that an increase
 in the navigable depths may be effected by the operation of a light-
 draft seagoing suction dredge. If made of sufficiently light draft,
 such a dredge could also be used at the mouth of the Brazos
 50 and at Brazos Santiago, if desired. Such a dredge is esti-
 mated to cost \$100,000; its maintenance for the entire year to
 cost \$75,000.

It is recommended that the appropriations, if made, be conditioned
 upon the furnishing of the sites for the shore ends of the jetties and
 the coast defenses which will probably be required after deep water
 is secured. This land has little value now, but will be very valuable
 after deep water is secured, and it is believed it should be furnished
 free of charge to the United States.

Very respectfully,

EDGAR JADWIN,
Major, Corps of Engineers, U. S. Army.

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Wash-
 ington, D. C.

THE BOARD OF ENGINEERS FOR RIVERS AND HARBORS,
 WASHINGTON, D. C., *December 22, 1906.*

GENERAL: 1. By reference of the Chief of Engineers, United
 States Army, the Board of Engineers for Rivers and Harbors has

received a resolution of the Committee on Rivers and Harbors of the House of Representatives, which is in part as follows:

Resolved, That the Board of Engineers on Rivers and Harbors, created by the act of June thirteenth, nineteen hundred and two, be requested to reëxamine the following projects, giving attention to such additional data or information as may be brought to their at-

51 tention, and, if possible, granting hearings to Members of Congress who desire to be heard, to wit:

* * * * * *

Aransas Pass, Texas.

* * * * * *

2. After a public hearing at Corpus Christi, Tex., and an examination of the locality by a committee of its members, the Board submitted a report on the subject of Aransas Pass on December 6, 1906, in response to a former resolution by the same committee of Congress, in which, after reviewing the history of the improvement of this Pass and describing its present physical condition, stated * * *

“the Board is of the opinion that there is a commercial necessity for an additional deep water harbor on the coast of Texas to the westward of Galveston, and that the most feasible point for such a harbor is at Aransas Pass; and the Board is of opinion that the creation of such a deep-water port at the Pass is justified by the commercial interests involved. The Board has not sufficient information upon which to base an opinion as to what is now the best method to be pursued to obtain a suitable entrance channel across the bar nor what the cost of such a channel will be.” * * *

3. Since the date of its former report the Board has received the accompanying report and estimate by the district officer for continuing work at Aransas Pass and a map of the locality on which is shown the plan he proposes, which consists in the main of a south jetty parallel to the general direction of the existing jetty and the extension shoreward of this existing jetty to connect with

52 St. Joseph Island. He proposes for the present to end the south jetty at a point nearly opposite the present outer end of the north jetty, expecting thereafter to extend both the north and south jetties about 1,750 feet, the exact distance and direction to depend upon the developments that take place as a result of the work now proposed. He also states that it may become necessary to remove about 1,000 feet of the outer end of the north jetty and carry the extension from that point parallel to the direction of the extension of the south jetty.

4. The estimates for the work now proposed are \$149,156 for the shore extension of the north jetty and \$339,543.50 for the construction of the south jetty, making a total of \$488,699.50. He estimates a probable cost of \$200 per foot for future jetty extensions, which under present conditions would have to be about 1,750 feet making the total cost of the extensions \$700,000, to which may have to be added the cost of removing a part of the north jetty and of probable dredging operations, the latter being estimated at \$100,000 for a dredge and \$75,000 annually for maintenance.

5. Having reviewed the report of the district officer and given

further consideration to the subject, the Board has arrived at the conclusion that a south jetty is essential to the development and maintenance of deep water over the bar entrance to Aransas Pass, that the plan proposed by the district officer is well adapted to the present physical conditions, complicated as they now are by the presence of the north jetty, and that his estimates are
53 reasonable. It therefore recommends the adoption of a project for the improvement of Aransas Pass, substantially as proposed by the district officer.

6. In this connection it is proper to call attention to certain features connected with the existing jetty commenced by the Aransas Pass and Harbor Company and completed by the United States in accordance with the plans of that company by direction of Congress. It is understood that in directing the completion of the plans of this company it was the intention of Congress to determine by actual experiment the feasibility of the improvement of this harbor by means of a single curved jetty, as opposed to the more expensive plans proposed by the Engineer Department requiring two jetties. While the Board is of the opinion that the construction of a south jetty is essential to this improvement, it should be noted that the experiment with a single jetty may not have been completed as originally contemplated, as would appear from the following extract from the original report of the consulting engineer of the Aransas Pass Harbor Company:

If a more rapid development of depths is desired than will result from natural causes, deepening may be facilitated by dredging or other auxiliary appliances. Since the forces necessary to maintain a channel are much less than those required to create it, a channel once developed and protected from silt, as this will be, may be maintained by the natural tidal currents from the bays, hence the cost of maintenance under the plan proposed would be a minimum.

The jetty was completed in June, 1906, and no dredging has been done.

7. Though of the opinion that a good entrance can never be maintained at this harbor by a single jetty, the Board be-
54 lieves that the extent to which the experiment with the company's plans should be carried is a matter for the determination of Congress.

Respectfully submitted,

D. W. LOCKWOOD,
Colonel, Corps of Engineers.

R. L. HIXIE,
Lieut. Col., Corps of Engineers.

E. EVELETH WINSLOW,
Major, Corps of Engineers.

CHESTER HARDING,
Major, Corps of Engineers.

W. J. BARDEN,
Captain, Corps of Engineers.

Brig. Gen. A. Mackenzie, Chief of Engineers, U. S. Army, Washington, D. C.

55

Affidavits of Lewis M. Haupt.

Filed February 7, 1908.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

Before me, the subscriber, a Notary Public in and for said state and county, appeared this day Lewis M. Haupt, who, being by me sworn, made oath and said that during the month of June, 1907, he applied to the office of the Coast and Geodetic Survey, in the city of Washington, in the District of Columbia, for a copy of any chart on file of a survey made in June, 1907, by engineers of the Corps of Engineers of the United States army, of the harbor of Aransas Pass, Texas, and said office, in reply sent to him the chart hereto attached, marked Exhibit "A." Affiant further states that the diagram hereto attached, marked Exhibit "B" is, as regards its plan and the profiles of the bottom of the channel and the top of said jetty, a true exhibit of the conditions shown by the figures on said chart, Exhibit "A," and that the other profile lines on said diagram show correctly the surfaces respectively designated as those are described or indicated in the successive reports of the Engineers of said Corps for the fiscal years 1902 to 1907 inclusive. Affiant further states that in a letter of transmittal from the office of the Coast and Geodetic Survey which accompanied said chart and was received by him it was said: "In regard to Aransas Pass they

56 are sending you from the office four black prints of the June survey which shows large—20 over the bar with some shoaler spots in the upper portion of the channel where the work evidently should be temporarily assisted by the use of a dredge." Affiant further states that the red lines on said chart have been inserted by himself and show correctly the respective contours as those were defined or indicated by the reports of the Chief of Engineers and the District Engineer for the fiscal year ending June 30, 1906.

LEWIS M. HAUPT.

Sworn to and subscribed before me this 24th day of Jan. 1908.

[SEAL.]

J. K. LEE SMITH,

Notary Public, 3602 Lancaster Av., Phila., Pa.

Commission Expires February 2nd, 1910.

18 S. BROAD ST., PHILA., *Dec. 29th, 1898.*

Thos. H. Franklin, Esq., President Aransas Pass Harbor Co., San Antonio, Texas.

DEAR SIR: The notice of the proposed meeting of the stockholders of the Aransas Pass Harbor Co. to be held at San Antonio on the 2d day of January to transfer the franchise "and the breakwater and jetty erected by the Company," to the Government is received and I desire to notify you and through you the Com-

57 pany that all previous plans having failed to secure results

the Company finally concluded to adopt my plans for the breakwater *under certain conditions*; one requisite being that the work should be executed strictly in accordance with the plans and specifications prepared by myself and under the rights reserved by Letters Patent granted to me by the United States.

I have therefore to notify you that in case of any transfer of this work to any other parties this must be made a necessary part of the agreement and that a full and explicit notice of my property right to have this breakwater completed upon my plan and under the original specifications and by the direction of the Consulting Engineers named therein must accompany such proposal to transfer or your Company will be held amenable for the damages, and that no departure from the aforesaid plans and specifications will be permitted either by the Government or its agents in the prosecution of this work.

Failure to serve such notice will render your Company responsible and will compel me to put a stop to the work by injunction for the prosecution of the patent rights granted me by the United States.

In case of the detention of this letter I shall telegraph you not to adjourn the meeting *sine die* until you hear from me in writing.

Very truly yours,
(Signed)

LEWIS M. HAUPT,
Consulting Engineer.

58 STATE OF PENNSYLVANIA, *Philadelphia County, ss:*

Before me, the subscriber, a Notary Public in and for said state and county, appeared this day, Lewis M. Haupt, who, being by me sworn, made oath that on or about the 29th day of December, 1898, he mailed to Thomas M. Franklin, President of the Aransas Pass Harbor Company, directed to him at San Antonio, Texas, a letter of which the foregoing is a copy. Affiant further states that the San Antonio newspapers of a few days later, in reporting proceedings of the directors of said company, stated that said letter was read before the Board and filed without action.

LEWIS M. HAUPT.

Subscribed and sworn to before me this 28th day of January, 1908.

[SEAL.]

J. K. LEE SMITH,
Notary Public, 3602 Lancaster Av., Phila., Pa.

Commission expires February 2nd, 1910.

STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

Before me, the subscriber, a Notary Public in and for said state and county, appeared this day Lewis M. Haupt who, being
59 by me sworn, made oath and said that he has, and since the "completion" of the reaction breakwater in the harbor of Aransas Pass, Texas, has had friends and acquaintances at and about Rockport, Texas, with whom he has been in correspondence and

who have advised him of all occurrences and developments, so far as he knows and believes, regarding said breakwater and its effects in scouring the channel, and, referring to the two reports of the Board of Engineers of the Corps of Engineers of the United States army, of date December 6th and December 22d, 1906, regarding said channel and said breakwater, he states that he has not been informed by his said correspondents or in any other way of any survey of any part of said harbor or channel or of said breakwater, made by or under the direction of said Board or any engineers of said Corps between the two said dates, and he verily believes no such survey was made.

LEWIS M. HAUPT.

Subscribed and sworn to before me this 24th day of January, 1908.

[SEAL.]

J. K. LEE SMITH,
Notary Public, 3602 Lancaster Av., Phila., Pa.

Commission Expires February 2nd, 1910.

60 STATE OF PENNSYLVANIA, *County of Philadelphia, ss:*

Before me, the subscriber, a Notary Public in and for said state and county, appeared this day Lewis M. Haupt, who, being by me sworn, made oath and said that the blue print hereto attached is, except as to its plan of the "reaction breakwater," a true copy of charts attached to reports of the District engineers at Galveston, Texas, of the Corps of Engineers of the United States army and Chief of Engineers for years 1883 to 1887 inclusive; that said plan of the reaction breakwater, included in said blue print, is a true and correct presentation of the original plan on which some construction was done by the Aransas Pass Harbor Company in the year 1895 and, except for the portion of the same between the letter "E" and the inshore end, is a correct presentation of the construction completed under appropriations of Congress in June, 1906; that said section of the plan between said station "E" and the inshore end has not been constructed, and that this section was intended to operate as a return flank to arrest cross-currents and prevent deposits by the same of material in the channel and is an important feature of said design.

LEWIS M. HAUPT.

Sworn to and subscribed before me, this 24th day of January, 1908.

[SEAL.]

J. K. LEE SMITH,
Notary Public, 3602 Lancaster Av., Phila., Pa.

Commission Expires February 2nd, 1910.

61

Affidavit of Joseph De Kinder.

Filed February 7, 1908.

STATE OF PENNSYLVANIA, *Philadelphia County*, ss:

Before me, Winfield J. Walker, a Notary Public in and for said state and county, appeared this day, Joseph de Kinder, who, being by me sworn, made oath and said that he is a Civil Engineer, practicing his profession in the city of Philadelphia, in the state of Pennsylvania; that for 40 years he has been practicing, either in charge of or as a consulting engineer upon or in connection with public improvements, buildings and other works and that during that time he has had much experience in hydraulic and hydrostatic engineering and has made much study of questions of hydrography both in the United States and in Holland; that he has for some years been familiar with the designs patented by Lewis M. Haupt for the construction of breakwaters and dikes and the scouring of channels through the reaction of currents to be created by them; that he is familiar, through the reports of the Engineers of the Corps of Engineers of the United States army and in other ways, with the development of a channel in the harbor of Aransas Pass, Texas, since the commencement there of the construction of a curved breakwater on said design by said Lewis M. Haupt, said data showing that

62 where there was formerly a depth of only about six feet of water a channel has been scoured, to a very considerable width and length, of the depth of twenty feet or more; that, in his opinion, the clearing of the channel has been effected by the influence of said jetty in creating and maintaining currents, and by its said influence, if it be not interfered with, it will continue to deepen and enlarge the channel; that if said design be abandoned and the form of said jetty changed and another jetty constructed in the channel opposite this one, but said changes be for some time postponed, said existing jetty, in his opinion, will, during such postponement, have accomplished something of what the said two jetties are designed to do and also it will decrease the difficulty and expense of said new construction.

JOS. DE KINDER.

Subscribed and sworn to before me this 28 day of January, 1908.

[SEAL.]

WINFIELD J. WALKER,

Notary Public.

Commission expires Jan. 19, 1911.

Affidavit of Thomas D. Pitts.

Filed February 7, 1908.

STATE OF MARYLAND, *City of Baltimore*, ss:

Before me, Felix R. Sullivan, a Notary Public, in and for said state and City, appeared this day, Thomas D. Pitts, who, being by me sworn, made oath and said that he is a Civil

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Engineer, practicing his profession in the city of Baltimore, in the state of Maryland; that he has been practicing that profession for 15 years, and has had much experience in hydraulic and hydrostatic engineering; that he has for some years been familiar with the designs patented by Lewis M. Haupt for the construction of breakwaters and dikes and the scouring of channels through the reaction of currents to be created by them; that he is familiar by personal knowledge, through the reports of the Engineers of the Corps of Engineers of the United States army and in other ways, with the development of a channel in the harbor of Aransas Pass, Texas, since the commencement there of the construction of a curved breakwater on said design by said Lewis M. Haupt, said data showing that where there was formerly a depth of only about six feet of water a channel has been scoured, to a very considerable width and length, of the depth of twenty feet or more; that, in his opinion, the clearing of the channel has been effected by the influence of said jetty in creating and maintaining currents, and by its said influence, if it be not interfered with, it will continue to deepen and enlarge said channel; that if said design be abandoned and the form of said jetty changed and another jetty constructed in the channel opposite this one, but said changes be for some time postponed, said existing jetty, in his opinion, will, during such postponement, have accomplished something of what the said two jetties are designed to do and also it will decrease the difficulty and

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THOMAS D. PITTS.

Subscribed and sworn to before me this 5th day of February, 1908.

[SEAL.]

FELIX R. SULLIVAN,

Notary Public, No. 23 South Street, Baltimore, Md.

Affidavit of E. K. Stimson.

Filed February 7, 1908.

Cash & Luckel, Texas and Mexican Real Estate, Loans, and Investments.

HOUSTON, TEXAS, *February 3d, 1904.*

From October 1901 to July 1903 I was stationed at Tarpon Texas immediately on Aransas Pass. I held the position under civil service rules of Recorder in U. S. Engineer Department, reporting directly to F. Opikoffer Assistant Engineer in charge of breakwater construction.

Being competent I was required by instructions from Capt. C. S. Riche corps of Engrs. U. S. A. in charge of Galveston district, to perform the duties of inspector and those of U. S. Asst. Engr. during the temporary absence from his post of that official.

65 In capacity of inspector, I supervised the placing of nearly all the rock in curved breakwater at the Pass under the con-
5—1898A

tract of Clarke & Co. for completing a 1,300 feet section of the structure from station 40 or "D" in to Station 27. I took daily soundings while thus employed.

At the beginning of work under contract the breakwater had been breached by a wide and deep crevasse through which tides ebbed and flowed, causing scour on North side and reducing effect of same on South or channel side.

At the moment this gap was closed by filling of rip rap, capped with block stone, the structure began to perform its predicted functions, viz: Shoaling bottom on North side and heavy scour on South side.

Surveys made since completion of contract have developed these results in most satisfactory manner, along entire section finished.

My observation while connected with the work was that these conditions were never given the credit or prominence they were entitled to under an unbiased trial of the Haupt patent.

Information given to prominent visitors (many of whom have been Representatives in Congress) by the Asst. Engr. was so far as I heard it constantly *ex parte* and prejudicial.

No favorable comment on the meritorious effects already demonstrated by use of the invention were ever made in my hearing. The constant theme was that eventually a south jetty recommended by U. S. Engineers would be constructed.

The custom on part of local pilots and some residents was to repeat these statements to visitors who each year inspected the gov't work.

Much adverse criticism has been brought about in this manner for which no opportunity is given to counteract by statement of facts in favor of the breakwater.

I became convinced that it was not the policy of the government authority in the district, to admit the existence of the subterranean jetty acting as an impediment to natural scour caused by the reaction breakwater.

No borings were made while I was on duty to demonstrate the presence or absence of such an obstruction although contract for removal by use of dynamite of the Mansfield jetty had been awarded for several months.

At time of my departure from the pass in July 1903 no contractor's outfit had come in to perform this work long authorized.

Whether intended or not, the fact is, that that delay in beginning removal of submerged jetty as required, has been notable and seemingly the rule.

I am in no way interested in making the foregoing statements other than a desire to see a fair trial given a plan whose successful operation I believe can be secured, as already proven.

E. K. STIMSON.

Sworn to and subscribed before me this 3d day of February, A. D. 1904.

[SEAL.]

EARL WARREN,
Notary Public, Harris Co., Texas.

67 PORTIONS OF TESTIMONY TAKEN IN COURT OF CLAIMS.

Filed February 7, 1908.

Court of Claims of the United States.

No. 28555.

HENRY C. RIPLEY

vs.

THE UNITED STATES.

* * * * *

Deposition of Edgar Jadwin.

* * * "The item for Aransas Pass does not mean that Congress has adopted the Haupt plan further than that a fair trial of the plan of the Aransas Pass Harbor Company is desired. Mr. Haupt made a strong appeal to the committee of the House for a contract to complete his work for the sum of \$500,000. While the committee did not wish to authorize such a contract, many of the members appeared to desire a test, and the wording found in the act was prepared by an officer in this office with a view and a promise that a full and fair test of the Haupt scheme for Aransas Pass should be provided for. It appeared to be the wish of the committee that a sufficient section should be given the north jetty to insure stability and such variation from the Haupt specifications may be permissible; but otherwise such specifications should be followed as closely as possible. The item regarding the removal of the old dam was also introduced with an object; it was claimed that such remnant

68 of dam interfered with the full results, and its removal was promised. Any further suggestions which Captain Riché may deem advisable in the light of the preceding remarks are desired. Preparations for carrying out the work on the lines herein laid down are authorized. It is desirable that the work be provided for as promptly as practicable and need not wait in connection with the proposition made by Captain Riché for combining contracts.

(Signed)

A. MACKENZIE,
Acting Chief of Engineers."

* * * * *

Deposition of Lewis M. Haupt.

* * * Answer. Briefly, I was connected with the construction of the Troy and Greenfield Railroad and Hoosac Tunnel in Massachusetts; was a graduate of the United States Military Academy, class of '67; was employed on the United States lake survey and afterwards as engineer officer for the United States Government of the Fifth Military district, State of Texas, in 1869, where it was a part of my duty to report on the harbors and rivers of that section.

I had charge of the protection of the Government reservation at Fort Brown, Tex., and made a reconnoissance of the various harbors from Galveston to the mouth of the Rio Grande, in consequence whereof my attention was emphatically directed to the necessity of removing the ocean bars to the various inlets on that coast, the deepest at that time being Galveston, with about 121½ feet. I resigned in August, 1869, and was appointed engineer at Fairmount
69 Park, Philadelphia, for the city of Philadelphia. Later was assistant examiner in the Patent Office, followed by twenty years as professor of civil engineering, University of Pennsylvania, during which time I was also assistant engineer in the Fourth Light-House district, in charge of surveys of the Delaware River, and later aid for the United States Coast Survey, in charge of the geodesy of Pennsylvania. During this period I developed a system for improving rivers and harbors by utilizing the force of the currents, tidal or otherwise, which received the highest indorsement of various scientific bodies and of international expositions. After resigning from the university in 1892, I was engaged in the practice of my profession as consulting engineer, in charge of surveys for ship canals, and was appointed by President McKinley as a member of the Nicaragua and Isthmian Ship Canal commissions. Since resigning from the Commission I have been devoting myself to the introduction of my own system of harbor improvements.

* * * * *

Answer. As professor of civil engineering, I felt the necessity for some standard work on this subject, as there was none in existence, and I prepared and published a book entitled "Engineering Specifications and Contracts," which was immediately adopted by a number of scientific schools and became the standard authority on that subject for some years. As nearly as I can remember, this book was published about 1879, and it has gone through several editions since. I was at the University of Pennsylvania when I published it. * * *

Filed February 28, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27557.

LEWIS M. HAUPT, Compl't,

vs.

WILLIAM H. TAFT, Secretary of War, ET AL., Def'ts.

This cause came on for hearing upon the Bill of Complaint, the rule to show cause, return of defendants thereto, and the demurrer of the defendants to the bill, and was argued by counsel, and thereupon upon consideration thereof, it is this 28th day of February 1908 ordered adjudged and decreed that the said De-

murrer be and it hereby is sustained and that the said rule be and it hereby is discharged, that the prayer for injunction be and it hereby is denied and that the bill of complaint be and it hereby is dismissed.

By the Court:

ASHLEY M. GOULD, *Justice*.

From the above decree, complainant in open court notes and prays his appeal to the Court of Appeals of the District of Columbia, which is hereby allowed, with bond for costs at \$100.

ASHLEY M. GOULD, *Justice*.

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Memorandum.

March 9, 1908.—Appeal bond filed.

Directions to Clerk for Preparation of Transcript of Record.

Filed March 11, 1908.

In the Supreme Court of the District of Columbia.

In Equity. No. 27557.

LEWIS M. HAUPT, Complainant,

vs.

WILLIAM H. TAFT, Secretary of War; ALEXANDER MACKENZIE,
Chief of Engineers, Defendants.

Complainant by his solicitors designates hereby, for inclusion in the transcript of the record required by his appeal to the Court of Appeals, the following named parts of the record:

Bill of complaint, with exhibit.

Defendants' demurrer.

Defendants' answer to rule to show cause.

Four affidavits of Lewis M. Haupt without map attached to one and blue print attached to another.

One affidavit of Joseph de Kinder.

One affidavit of Thomas D. Pitts.

72 One affidavit of E. K. Stimson.

Portions below of printed copy of testimony taken in Court of Claims case of Henry C. Ripley *vs.* The United States, No. 28,255:

Copy, at pages 185 and 186, in deposition of Edgar Jadwin, of letter written by the Acting Chief of Engineers to the District Engineer of the United States army at Galveston, Texas, of date July 14, 1902.

The answer of Lewis M. Haupt as a witness commencing on the bottom half of page 193 and occupying the first ten lines of page 194 and his last full answer, commencing with the words: "As professor of civil engineering," on page 199.

BENJ. CARTER,

O. H. DOWELL,

Solicitors for Complainant.

73 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 72 both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 27557 equity, wherein Lewis M. Haupt is Complainant, and William H. Taft, Secretary of War, and Alexander McKenzie, Chief of Engineers, are Defendants; as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 22nd day of April, A. D. 1908.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk*,
By ALF. G. BUIRMAN,
Ass't Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 1898. Lewis M. Haupt, appellant, vs. William H. Taft, Secretary of War, *et al.* Court of Appeals, District of Columbia. Filed Apr. 23, 1908. Henry W. Hodges, clerk.

FILED

NOV 30 1918

*Henry W. Rodgers,
Clerk.*

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1898.

LEWIS M. HAUPT, APPELLANT,

vs.

LUKE E. WRIGHT, SECRETARY OF WAR, ET AL.

BRIEF FOR APPELLANT.

BENJ. CARTER,
OSGOOD H. DOWELL,
Attorneys for Appellant.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

No. 1898.

LEWIS M. HAUPT, APPELLANT,

vs.

LUKE E. WRIGHT, SECRETARY OF WAR, ET AL.

BRIEF FOR APPELLANT.

Statement of the Case.

A brief has already been filed for appellees containing a summary, in proper form, of the pleadings and affidavits filed. The court's convenience will be served therefore if we first point out some omissions and other inaccuracies, of a venial enough sort, in the substance of that statement.

(1) It is distinctly alleged and proved that the transfer to the United States of the rudimentary jetty of the Aransas Pass Harbor Company and the franchises the company had received through an act of Congress was *not* the result of any solicitations or negotiations of appellant with that company or with the proper representatives of the United States. Appellant was not a party in any sense to this transfer of the part foundation of the jetty, and he took pains to make it known, by a communication to the president of the company, that the license that he had given the company to use his patent could not be assigned by it. It was because

of this notice, no doubt, the deed executed by the company to the Government made no mention of this license or any right to use the patent (Printed Rec., pp. 12, 13, 29).

(2) When Congress directed the Corps of Engineers to make use of appellant's patent on a contract to be let by themselves, it had before it another proposition of appellant, to which he, if Congress chose to put to work into his hands, would construct the jetty for \$500,000, and claim nothing as royalty (Rec., p. 5).

(3) The jetty was never actually completed on appellant's design. The design called for a wing at the inner end to shut off the tidal currents which would carry sand into the excavated channel. Both of appellant's propositions of that time were made on the alternative conditions that some little dredging, indicated by him, would be done or that, failing this dredging, some four years should be allowed, after the completion of the jetty, for its exemplification (Rec., p. 7).

(4) It is an error to say (Brief for appellees, p. 3) that the bill confesses that appellant's design had proved unsuccessful. The bill does say that the army engineers claimed that it did not do what was promised and finally persuaded Congress to abandon the design; but it also states that these representations were not correct; that notwithstanding the failure to complete the jetty entirely it is rapidly scouring out a channel (Rec., p. 8).

(5) The bill charges that, not merely the specifications of the final contract on this improvement, let under the act of Congress of March 2, 1907, to which reference is made at pages 3 and 4 of the brief for appellees, but also the recommendation in the report of the Board of Engineers of December 22, 1906, which was adopted in this act as the basis for this work, was absolutely incompatible with appellants design and would inevitably prevent its exemplification (Rec., pp. 9, 10).

(6) As regards the necessity for early work under the final contract (that awarded to David M. Picton), the bill and affidavits for appellant go beyond the statement at page 4 of the brief for appellees. They say that delay of the work awarded to Picton, so far from hurting the improvement, will have, through the further scouring by the reaction or "Haupt" jetty," much reduced the cost of the new work (Rec., p. 11).

(7) Whether the United States acquired all the rights of the Aransas Pass Harbor Company with reference to the jetty (Brief for appellees, p. 5), is a question of law turning on the facts stated of the bill, in appellant's affidavits and in the answers to the bill and to the rule to show cause, which involve no conflict whatever. From the allegations of appellant and appellees and these affidavits, the legal conclusion follows that the United States did not acquire from the Aransas Pass Harbor Company any right to the use of appellant's patent even on the one structure in question.

(8) To the statement, at page 6 of brief for appellees, that the Board of Engineers made a report which was forwarded to the Chairman of the House Committee on Rivers and Harbors, it should be added that the board, although reviewing at length the history of this improvement, recoiled from squarely proposing any other plan, saying that "an additional examination and survey," would be required for any safe decision on this point (Rec., pp. 21, 22).

(9) It was proper to state also (Brief for appellees pp. 5 and 6) that although the report of the Board of Engineers which served as a reply to the letter of Chairman Burton of December 17th bears date of December 22d, it refers to and relies largely on a report of Major Edgar Jadwin, the District Engineer at Galveston, who had had supervision of the work done on the Haupt design and shared the antagonism of the army engineers to it, and

that Major Jadwin himself, while submitting a rehash of the preconceived objections of the Corps of Engineers to the Haupt design, said that it should still be left to Congress to say, free from these criticisms, whether the work should still be prosecuted on the Haupt plan. From the facts pleaded for appellant and appellees it is clear that this guarded attack of Major Jadwin on the Haupt design was made without any "additional examination and survey" such as was called for in the report of the Board of Engineers of December 6th. Only two days intervened between Chairman Burton's letter and this long report of Major Jadwin, which itself bears date of Washington city (Rec., pp. 23, 24, 27).

(10) Again, it should have been said that in the report of December 26, 1906 (Brief for appellees, p. 6), it was pointed out that the construction of the single (Haupt) jetty "may not have been completed as originally contemplated," and that the Board in summing up expressed its conviction that the extent to which the construction might well be carried on this single jetty plan and opportunity afforded for the demonstration of its value should still "be carried as a matter for the determination of Congress" (Rec., p. 28).

In its essentials, then, the case made by the bill, affidavits, and answers is this: that, having been educated at West Point and after serving some years in the coast and geodetic survey of the Government in Texas and elsewhere, appellant in private practice acquired such a reputation with regard to the improvement of waterways that he was appointed by President McKinley a member both of the Nicaraguan and the Isthmian Ship Canal Commission; that on his retirement from the latter commission he prepared, patented, and published a design for a jetty on which he received a very distinguished honor from the American Philosophical Society; that he applied to the Committees of Congress

either for a contract to construct himself, under direct appropriation, a jetty at Aransas Pass on this design, charging nothing for the use of the latter, or for an appropriation in the usual form, under which the design should be applied by the Corps of Engineers, without royalty or other compensation to him, unless the jetty should accomplish what he claimed for it—this result to be accomplished within a year if the dredging indicated by him were done, and in four years if the dredging were not done; that from the outset, even before the overtures of appellant to Congress, the design encountered severe criticism and opposition from the army engineers; that the Senate Committee on Commerce had reached a decision to provide for the construction of this jetty on appellant's design, but, yielding to an appeal of the Acting Chief of Engineers, merely made an appropriation for a portion of the work and left the award of the contract and the supervision of that particular work to the Corps of Engineers; that appellant, his offer to construct the jetty for a lump sum being declined, never in any way waived his right to be paid for the use of his patent, but merely deferred the assertion of his right until there should be fair opportunity for the jetty to prove its efficiency; that the jetty had accomplished much of what appellant had promised for it while a gap in the structure, inconsistent with the design and interfering radically with the promised automatic scouring, remained open, this gap not being closed until in June, 1906; that one part of the project as designed by appellant, viz, a wing at the inner end to shut off the coastwise currents, has never been constructed, and by reason of this defect the good results from the jetty have been greatly impaired; that the small amount of dredging indicated by appellant as essential to the speedy accomplishment of the work of the jetty was never done; that in spite of said obstacles

said jetty had scoured a channel 15 feet deep for a length of 175 feet opposite the jetty, while for a considerable distance there was a depth of 20 feet over a channel 150 feet wide—the maximum reliable depth in the channel before the jetty was constructed having been $6\frac{1}{2}$ feet; that, the Corp of Engineers, after the report of the Board of Engineers dated December 26, 1906, was made, prevailed upon Congress to abandon said design and to make appropriation for work which would forever defeat its exemplification and annihilate or obscure the results it had accomplished.

The United States, we see, laid hands on appellant's patent and has used it with great advantage to the Aransas Pass Channel. In doing this Congress has not paid or promised to pay anything to appellant, for which reason the taking was in violation of the constitution. Appellant might well have confined his narrative to these facts and asked that all work on the jetty be enjoined until he is paid for the use of his patent, or until Congress has made some provision for his compensation. The substance of the remaining part of his narrative in the bill is merely that he had agreed to suspend all claims for compensation until the jetty should have been fully completed and been allowed a stipulated opportunity to show its good work, and that Congress has violated that agreement.

ARGUMENT.

The first proposition asserted by counsel for appellees as forbidding the relief sought by appellant is that he has no property in the physical structure on which his patent has been utilized. This can not be denied, but it is equally clear, we submit, that counsel draw an erroneous conclusion from the fact.

While appellant has no property interest whatever in the stones and other materials of the jetty, whether awaiting use or actually placed in the structure, the design, the idea, on which an efficient appliance was to be constructed of those materials, was and is his property. It must be a rare case, indeed, if any patentee, successfully complaining of an infringement, has alleged that the materials which were used or were destined for use in the appliance described belonged to him. He need allege no more than that he owned, by a patent from the United States, a novel and useful idea which was to be incorporated into the appliance.

What expenditures had been made by the Government and its predecessor in title on the physical structure or materials therefor is of no consequence. The Government has paid nothing to appellant for the construction of this appliance on the peculiar plan covered by his patent, and in that fact is his right of action.

Considering this for a moment as a case of infringement purely, we shall not stop to discuss the cases cited at the bottom of page 8 of the brief for appellees; but we submit below a few authorities to the point that a patent right is private property within the meaning of the Constitution and can not be taken by Congress itself without compensation to its owner.

U. S. vs. Palmer, 128 U. S., 262.

Pompelly vs. Green Bay Co., 13 Wallace, 166, 171.

Thompson vs. Androscoggin River Improvement Co., 54 N. H., 545.

Lewis on Eminent Domain, sec. 59.

Randolph on Eminent Domain, sec. 81.

On the third point in the argument of counsel for appellees we have very little to say. We feel that we should scarcely be respectful to your Honors if we should thrust upon you a list of all the cases in which you have

condemned that proposition. Has this court ever, on the ground here suggested by counsel, refused, for example, to enjoin the payment of money by the Treasurer of the United States when the statute under which he was acting was unconstitutional or when the construction given to the statute was erroneous? In a similar case, has this court ever, on the ground here suggested, denied a writ of mandamus to prevent an unlawful ministerial act of a Government officer; and what difference is there, in the essence, between a mandamus and a mandatory injunction?

We take it counsel do not mean to assert that an act of Congress is any more sacred against review and restraint, on constitutional grounds, by the courts than is an act of a State legislature. In *Belknap vs. Schild*, 161 U. S., 10, the Supreme Court were at pains to say that no such distinction could be drawn.

The second and third propositions in the argument for appellees, stated inversely, are that this is a suit against the United States, and therefore beyond the jurisdiction of the courts and that, even though the courts have jurisdiction over the parties, the administration of an act of Congress can not be enjoined.

On the question whether the defendant in a suit of this nature is the individual who holds office in the Government of the United States or the United States itself, this court has recently declared itself clearly and vigorously. I could not frame in reply to the brief for appellees an argument at once so succinct and so convincing as that which Mr. Justice Robb has written in the case of *Fried Krupp Aktiengesellschaft vs. William Crozier*, decided October 7th, last.

Mr. Justice Robb in that decision said:

“That ‘no man is so high that he is above the law’ and beyond the coercive process of the courts has long been definitely determined. *Osborne vs. U. S.*

Bank, 9 Wheat., 738; *U. S. vs. Lee*, 106 U. S., 196; *Pennoyer vs. McConnaughy*, 140 U. S., 1; *Tindal vs. Wesley*, 167 U. S., 204; *Amer. School of Magnetic Healing vs. McAnnulty*, 118 U. S., 94."

If no "man" is above the law, neither is Congress (that association of men by which our ordinary laws are enacted), above the organic law of the land, which has as its chief concern the protection of the people against aggressions of all branches of the Government.

In the next paragraph to the above Mr. Justice Robb says:

"We can not see that this case differs in principle from the case last cited, which was a suit against the United States postmaster in charge of the United States postoffice at Nevada, Mo., to restrain him from carrying out the provisions of a so-called 'fraud order' issued by the Postmaster-General. It was held that inasmuch as the Postmaster-General in issuing the order exceeded his authority the plaintiff was entitled to relief. The court said: 'The acts of all its (the Government's) officers must be justified by some law, and in case an official violates the law to the injury of one individual the courts generally have jurisdiction to grant relief.'"

In the present case the Secretary of War and the Chief of Engineers are undertaking to do something which is outside their authority, the legislation under which they are acting being void because repugnant to the Constitution.

In view of the latest decision of this court we now say again what we said in our brief submitted in the lower court, that, because the United States had a good title to the completed piece of machinery with which *Belknap vs. Schild* was concerned, the engineer officer was not merely authorized, but was enjoined by his oath of office to introduce this appliance in the dam he was constructing;

that there was no constitutional vice in the mandate under which he was about to use the patented caisson and, in the engineer's action no misinterpretation of the act of Congress in question, and therefore what he was doing was unlawful and could not be enjoined.

We also venture to say again that there is not a word in the decision in *Belknap vs. Schild*, or other comparatively late decisions of the Supreme Court, to derogate from the authority of *Pennoyer vs. McConnaughy* and the cases there cited to the effect that acts of public officers done under legislation which was invalid could be enjoined.

The last word of the Supreme Court on the point now under consideration is this, said in the case of *Tindal vs. Wesley*, 167 U. S., 204:

“When such officers or agents assert that they are in rightful possession, they must make good that assertion when it is made to appear in a suit against them as individuals that the legal title and right of possession is in the plaintiff. If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute, whereby the plaintiff's property will be injured, or to recover damages for taking under a void statute the property of the citizen, be not one against the State, it is impossible to see how a suit against the same individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State. Any other view leads to this result: That if a State, by its officers, acting under a void statute, should seize for public use the property of a citizen, without making or securing just compensation for him, and thus violate the constitutional provision declaring that no State shall deprive any person of property without due process of law. *Chicago, Burlington, etc., Railroad vs. Chicago*, 166 U. S., 226, 236, 241, the citizen is remediless so long as the State, by its agents, chooses to

hold his property; for, according to the contention of the defendants, if such agents are sued as individuals, wrongfully in possession, they can bring about the dismissal of the suit by simply informing the court of the official character in which they hold the property thus illegally appropriated. It is true that even in such a case the citizen may, if he choose, rely upon the good faith of the State in the matter of compensation. But he is not compelled to part with his property for public use except upon the terms prescribed by the supreme law of the land, namely, upon just compensation made or secured."

If what we have already said is a sufficient answer to the first three propositions in the argument made for appellees, we have no need to dissect the argument made on the fourth proposition, viz., that the work sought to be enjoined has been decreed by a political department of the Government, or to cite authorities by which to confute the argument. However wise Congress may have been in submitting this project, considered as a matter of engineering, to the Corps of Engineers or the Secretary of War, after appellant's design had been utilized with large results, and however unimpeachable is the decision of the War Department in any matter lawfully referred to it, nothing that Congress itself does and nothing that it directs any executive department to do is lawful, and beyond the jurisdiction of the courts, if it offends the constitution.

Having thus far replied to the particular arguments presented for appellees, we now proceed to submit other propositions, in part subsidiary to those, but in part beyond their scope.

V.

THE ARANSAS PASS HARBOR COMPANY COULD NOT AND DID NOT CONVEY TO THE UNITED STATES ANY RIGHT TO USE APPELLANT'S DESIGN, EVEN ON THE IMPROVEMENT OF THE ARANSAS PASS HARBOR.

A license to use a patented invention is neither an assignment nor a grant.

Waterman vs. McKenzie, 138 U. S., 258.

Wooster vs. Seidenberg, 13 Blatch, 88.

A license to use a patent is not assignable by the licensee in the absence of apt words authorizing the assignment. It is presumed to be personal to the licensee and unassignable—even though it were granted for a valuable consideration.

Hapgood vs. Hewitt, 119 U. S., 226.

Oliver vs. Rumford Chemical Works, 109 U. S., 75.

Brush Electric Co. vs. California Electric Light Co., 52 Fed. Rep., 945.

Walter A. Wood Harvester Co. vs. Minneapolis-Esterly Harvester Co., 61 Fed. Rep., 256.

Troy Iron & Nail Factory vs. Corning, 14 How., 193.

Bowers vs. Lake Superior Contracting & Dredging Co., 149 F. R., 983.

Dorsey R. H. Rake Co. vs. Bradley Manufacturing Co., 12 Blatch, 202.

A license to make and use a patented device, not an article of commerce, does not authorize a sale of the article so constructed and does not authorize any purchaser to use it.

International Pavement Co. vs. Richardson, 75 Fed. Rep., 590.

Wilson vs. Stolley, 3 McLean, 277.

Chamber vs. Smith, 5 Fisher, 12.

Walker on Patents, sec. 300.

Robinson on Patents, sec. 812.

A license to use a patent at a certain place does not pass with a conveyance of that site and a device constructed there under the license.

Robinson on Patents, sec. 812, note 3.

VI.

ONE WHOSE PRIVATE RIGHT IS INVADED EVEN FOR A PUBLIC USE IS ENTITLED TO AN INJUNCTION REGARDLESS OF ALL QUESTIONS OF IRREPARABLE INJURY; THIS, BECAUSE, AS A MATTER OF SOUND PUBLIC POLICY, PUBLIC CORPORATIONS OR OTHERS EXERCISING SIMILAR POWERS ARE TO BE CONFINED STRICTLY WITHIN THEIR TRUE AUTHORITY.

Platt vs. Roseland R. Co., 50 N. Y., 150.

Western Maryland R. Co. vs. Owings, 15 Md. 199.

Bolton vs. McShane, 67 Iowa, 637.

East & West R. Co. vs. E. T. V. & G. R. Co., 75 Ala., 275.

Bass vs Metropolitan West Side El. R. Co., 82 Fed. Rep., 857.

Wiedenfeld vs. Sugar Run R. Co., 48 Fed. Rep., 615.

Kerr on Injunctions, sec. 295.

Lewis on Eminent Domain, sec. 632.

Randolph on Eminent Domain, sec. 382.

VII.

AN INJUNCTION, IN THE PECULIAR CIRCUMSTANCES OF THIS CASE, IS THE ONLY MEANS OF SECURING TO APPELLANT HIS DUE COMPENSATION AND SHOULD BE GRANTED FOR THIS REASON.

To this point we have treated appellant's ground of complaint as a mere matter of infringement of a patent. In ordinary cases such an infringement will be restrained by injunction. In this case, however, there are extraordinary grounds for an injunction. Some of those grounds

are covered by the paragraph below, with which the opinion of this court, in *Fried. Krupp Aktiengesellschaft vs. William Crozier*, concludes:

“Assuming for the purpose of this opinion the truth of the allegation of infringement, it is apparent that, unless the relief sought is granted, plaintiff’s patents will be valueless in the United States since they are of use to the Government alone.”

If the progressive work of the Haupt jetty at Aransas Pass, so far as the jetty is completed, be obliterated (as must be done by the construction provided for in Picton’s contract), there will be no criteria of appellant’s injury; and this is but another way of saying that the threatened injury to appellant will be irreparable. The subject-matter of this suit, in so far as appellant’s compensation is concerned, is the work that this jetty is doing; and what the jetty will accomplish can not be known if it be itself, in effect, destroyed as is ordained in the Picton contract.

That is irreparable injury which would destroy the subject-matter of the controversy or would so change the situation that the damages due could not be accurately ascertained.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1.

Northern Pacific Co. vs. Spokane, 52 Fed. Rep., 428.

Williams vs. Long, 129 Cal., 228.

Kerr on Injunctions, ch. 15, sec. 1, paragraph 5.

Rutland Marble Co. vs. Ripley, 10 Wall., 339.

Damages are “irreparable” where proceedings in law would not yield the full fruits sought in the equity proceeding, even though some substantial compensation might be recovered at law.

Phillips vs. Thompson, 1 Johns. Ch., 131.

Wilson vs. Mineral Point, etc., Co., 39 Wis., 160.

Welton vs. Dixon, 38 Neb., 767.

High on Injunction, sec. 702, 703, 724.

Under the above authorities a mere sentimental injury e. g. the desecration of graves of ancestors, the removal of ancient trees about a residence, or the destruction of due reputation and credit on any scientific work, is ground for an injunction.

Let us, in conclusion, frame a hypothetical case on all fours with this case. Let us suppose that an expert miner had contrived and patented some mechanical appliance through which, by the mere impact of falling coal, mined in any accustomed way, the water which had formerly fallen with the coal to the floor of the mine was driven back into and forced to permeate the remaining deposit of coal and thereby reduce the difficulty and cost of its excavation; that the device had been unlawfully utilized by some mining company until a considerable amount of coal had been mined and a considerable saving effected in the process; that at that stage a large but undetermined quantity of the coal remaining in the mine had been so affected by the patented device that it could and would be extracted at the reduced cost, and that the mining company, paying or pledging nothing to the patentee for what the device had accomplished and was accomplishing, was about to install machinery which would take the coal out in such way that the good effect of the prior plan would be discarded or hopelessly obscured. In that case would not the patentee be entitled, as a necessary incident of his remuneration, to an injunction; and if the patentee's bill would lie and an injunction be granted in that case, does not the bill lie and should not an injunction be granted in the present case?

Respectfully submitted.

BENJ. CARTER,
OSGOOD H. DOWELL,
Attorneys for Appellant.